Ping Anak Layang v Jee Shik Chuong & Anor

HIGH COURT (KUCHING) — CIVIL SUIT NO K 444 OF 1979
HAIDAR J
15 AUGUST 1990

Land Law — Transfer — Registration of transfers — Whether registered transfers can be set aside on ground of actual fraud — Actual fraud must be proved beyond reasonable doubt — Sarawak Land Code (Cap 81), s 134(1)

Evidence — Burden of proof — Fraud — Fraud must be proved beyond reasonable doubt — Fact that price of transaction is below market value by itself does not mean fraud — Allegation based on suspicion and conjecture is insufficient to prove fraud

The plaintiff had a parcel of land, part of which he agreed to sell to one Tsai. After survey and demarcation, the plaintiff's land was divided into three lots. The plaintiff then sold lot 75 to the first defendant and lot 73 to the second defendant. Both transfers were registered. The plaintiff claimed to set aside both registered transfers on the ground of fraud. The plaintiff alleged that he only intended to sell lot 73 to the first defendant because lot 75 had already been sold to Tsai. The plaintiff further alleged that the first defendant had fraudulently represented to him that he was only transferring lot 73, and this induced the plaintiff to sign the transfer instrument. The plaintiff also alleged that he did not agree to sell lot 73 to the second defendant as he did not know the second defendant and he had intended to sell lot 73 to the first defendant.

Held, dismissing the plaintiff's claim:
The plaintiff had failed to prove beyond reasonable doubt that actual fraud was committed by the first defendant. The fact that the prices of the transactions might be slightly below the market value, by itself, did not mean that there was actual fraud. At most, the plaintiff's allegation was based on suspicion and conjecture which are insufficient to prove fraud.

[Bahasa Malaysia summary

Plaintif mempunyai sebidang tanah, sebahagian daripadanya beliau bersetuju menjual kepada seorang bernama Tsai. Selepas pengukuran tanah dan penandaan sempadan, tanah plaintif telah dibahagikan kepada tiga lot. Plaintif kemudiannya telah menjual lot 75 kepada defendan pertama dan lot 73 kepada defendan kedua. Kedua-dua permindahan itu telah didaftarkan. Plaintif menuntut untuk mengetepikan kedua-dua pemindahan berdaftar itu atas alasan fraud. Plaintif mendakwa bahawa beliau cuma berhasrat menjual lot 73 kepada defendan pertama kerana lot 75 telah pun dijual kepada Tsai. Plaintif selanjutnya mendakwa behawa defendan pertama telah menyatakan secara fraud kepadanya bahawa ia cuma memindahkan lot 73 dan ini telah mendorong plaintif menandatangani suratcara pemindahan. Plaintif juga mendakwa bahawa beliau tidak bersetuju menjual lot 73 kepada defendan kedua kerana beliau tidak mengenali defendan kedua dan beliau berhasrat menjual lot 73 kepada defendan pertama.

Diputuskan, menolak tuntutan plaintif:
Plaintif telah gagal membuktikan melepasi was-was yang berpatutan bahawa fraud sebenar telah dilakukan oleh defendan pertama. Hakikat yang harga transaksi itu mungkin lebih rendah sedikit daripada harga pasaran, secara sendiri, tidak bermakna bahawa terdapat fraud sebenar. Paling banyak sekali, dakwaan plaintif adalah berdasarkan kesangsian dan tekaan yang tidak mencukupi untuk membuktikan fraud.]

Cases referred to
1 *Mohamed Isa* v *Haji Ibrahim* [1968] 1 MLJ 186 (refd)
2 *Assets Co Ltd* v *Mere Roihi* [1905] AC 176 (refd)
3 *Chu Choon Moi* v *Ngan Sew Tin* [1986] 1 MLJ 34 (refd)
4 *Chong Sin Kong* v *Chong Kuk Cheong* (1954) SCR 118 (refd)

Legislation referred to
Sarawak Land Code (Cap 81) ss 134(1)
Stamp Act 1949

John Lee Thian Hsien for the plaintiff.
Fabian Lim for the defendants.

Cur Adv Vult

Haidar J: In this action the plaintiff claims against the defendants for:

(a) A declaration be granted to the plaintiff against the defendants that the transfers dated 30 September 1977 and 19 June 1978 executed by the plaintiff in favour of the defendants and registered at the Kuching Land Registry on 9 August 1978 under instrument no 15936/78 and on 6 October 1978 and registered under instrument no 7768/78 are null and void and a decree setting aside or cancelling the said transfer deeds be passed in the plaintiff's favour against the defendants.
(b) Such other relief as the honourable court deems fit.
(c) Costs.

During the course of the hearing, Mr John Lee, counsel for the plaintiff, applied for amendment of the reply and defence to the counterclaim as follows:

(i) The heading 'Reply To Defence And Counterclaim' to read 'Reply And Defence To Counterclaim'.
(ii) In para 2 thereof, the words 'registrable interest' should read 'caveatable interest'.

As Mr Fabian Lim, counsel for the defendants, did not object to the application for amendments, I granted the application accordingly. In any event Mr Fabian Lim indicated that the defendants are not interested in pursuing their claims for damages or compensation if the action is dismissed.

There are seven issues in the pleadings:

(1) Whether the plaintiff intended to sell and transfer lot 75 Block 15 Bukar Sadong Land District to the first defendant for $10,000;
(2) Whether the plaintiff intended to sell and transfer lot 75 Block 75 Bukar Sadong Land District to the second defendant for $36,000;
(3) Whether full consideration for selling prices for both sales and transfers had been paid to the plaintiffs;
(4) Whether there was any fraud in the sales and transfers of the plaintiff's lands, lots 73 and 75 to the defendants respectively;
(5) If there were, who committed the fraud;

(6) As to the counterclaim by the first defendant, whether or not the plaintiff had caveated lot 75 with reasonable cause, ie whether he had any caveatable interest in lot 75; and
(7) If not, whether the first defendant had suffered damage.

The facts in brief are as follows. The plaintiff had a parcel of land under native customary rights of about seven acres close to Serian town. Sometime in 1966 the plaintiff agreed to sell part of the land to one Tsai Jew Fah (f) (PW4) and executed a memorandum of sale (exh P3) to her on 25 October 1966. At the time of execution of P3 the land was unsurveyed and undemarcated. Sometime during the year 1974 the plaintiff's land was settled resulting in the land being converted into a mixed zone and divided into three lots, described as lots 73, 74 and 75 respectively. For this case only lots 73 and 75 are relevant. Lot 73 containing an area of 2.81 acres was referred to as the smaller lot and lot 75 containing an area of 4.41 acres was referred to as the bigger lot.

Before the title deeds were issued the first defendant approached the plaintiff in 1977 to sell lot 75 to him after the first defendant's son (DW3) informed him of the settlement of the plaintiff's land. According to the first defendant, the plaintiff agreed to sell lot 75 to him for $8,000 which was subsequently increased to $10,000. However the plaintiffs said that he intended to sell to him the smaller lot, ie lot 73 as lot 75 had been sold to PW4. The plaintiff further alleged that he did not receive the sum of $8,000 and later admitted receiving $2,000 from the first defendant. The plaintiff also alleged that he did not agree to sell lot 73 for $36,000 to the second defendant as he did not know him and it was intended for sale to the first defendant and alleged that the transfer of the two lots to the defendants was false and fraudulent. The alleged fraud was particularized as follows. The first defendant falsely and fraudulently represented to the plaintiff that the plaintiff was transferring to the first defendant the smaller parcel of land, namely lot 73, knowing full well that the transfer was in respect of the bigger parcel of land, viz lot 75 and thereby induced the plaintiff into signing the transfer deed, instrument no L5936/78.

Again, the first defendant falsely and fraudulently represented to the plaintiff that the plaintiff was signing a receipt, acknowledging an additional payment of $6,000 as consideration for the transfer of the smaller parcel of land viz, lot 73, but whereas he knew full well that the purported receipt for the sum of $6,000 was in fact a transfer of lot 73 in favour of the second defendant.

On the effect of fraud, s 134(1) of the Sarawak Land Code (Cap 81) reads:

> Any issue document of title or entry or alteration in the Register procured or made by fraud shall be void as against any person defrauded, or who may be defrauded thereby, and no person who is a party or privy to the fraud, or who claims solely as a volunteer under such person, shall take any benefit therefrom.

According to the Federal Court case of *Mohamed Isa* v *Haji Ibrahim*[1] 'fraud' means actual fraud and in support thereof cited a passage from the judgment of the Privy Council in *Assets Co Ltd* v *Mere Roihi*[2] at p 210 which reads:

> By fraud in these Acts is meant actual fraud, ie dishonesty of some sort, not what is called constructive or equitable fraud — an unfortunate expression and one very apt to mislead, but often used, for want of better term, to denote transactions having consequences in equity similar to those which flow from fraud.

As regards 'proof' our Supreme Court in *Chu Choon Moi* v *Ngan Sew Tin*[3] at p 38 said:

> We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (*Narayanan* v *Official Assignee, Rangoon* AIR 1941 PC 93; *Saminathan* v *Pappa* [1981] 1 MLJ 121. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court believes its existence or a prudent man considers its existence probable in the circumstances of the particular case.

It is not disputed that the plaintiff agreed to sell one of the lots to the first defendant of $8,000 (later $10,000) but the issue is which is the relevant lot for sale? The plaintiff contended that he intended to sell the smaller lot, ie lot 73 to the first defendant as he had already sold the bigger lot, ie lot 75 to PW4 for $200 in 1966 whereas the first defendant contended that the plaintiff agreed to sell the bigger lot, ie lot 75 to him. The question is who is telling the truth here and whose evidence is supported in this case in order to ascertain whether there is actual fraud by the first defendant as claimed by the plaintiff. I am prepared to accept that the agreement (P3) between the plaintiff and PW4 was executed in 1966 though I would say that based on the evidence of DW4, the postal clerk, the stamp was affixed after 16 November 1970. However, the interesting question to ask here is why the plaintiff did not disclose this sale to PW4 to the first defendant when the first defendant approached him for the sale of lot 75. Instead the plaintiff merely said the he intended to sell lot 73 to the first defendant and not lot 75 and that the first defendant knew of this and this is purely a conjecture on his part.

To my mind, the allegation of fraud by the plaintiff depends very much on whether the evidence of lawyers, Yap Hian Boon (DW5) and Mark Chin Ted Swee (DW6) can be accepted by the court or not. DW5 gave

evidence in court that he explained the contents of the documents executed by the plaintiff and the first defendant to them and confirmed from the plaintiff that the land is lot 75 and the money was received by him. In fact DW5 was cross-examined on his competency of local Malay by Mr John Lee, counsel for the plaintiff and I am satisfied as to DW5's competency when he explained the contents of the document in local Malay to the plaintiff. The first defendant's evidence is consistent as is borne out by the documents when he said that the price was originally $8,000 but was later increased to $10,000. This piece of evidence was confirmed by DW5 himself before the memorandum of transfer was executed by them in DW5's presence. Though Mr John Lee did not dispute the memorandum of transfer and the agreement between the plaintiff and the first defendant, he disputed the contents thereof. However, having heard and observed DW5 I have no reason to reject his evidence. Similarly in respect of Mark Chin Ted Swee (DW6), the lawyer who attended to the sale of lot 73 between the plaintiff and the second defendant, I see no reason to reject his evidence that he (DW6) explained personally the contents of the memorandum of transfer and the agreement in respect of lot 73 to the plaintiff and the second defendant. DW6 went on further to say that the money was paid in his office. It is not disputed that the plaintiff is entitled to introduce parol evidence to rebut payment even if it is evidenced in the recital in a document as in this case in the absence of a proper receipt (see *Sarkar on Evidence* (12th Ed) p 802; *Chong Sin Kong* v *Chong Kuk Cheong*[4] but as I said earlier I do not have reasons to reject the evidence of DW5 and DW6 and as such I am of the view that the payments were made by the defendants to the plaintiff and received by him accordingly. There is no question of the plaintiff, to my mind, being misled about the transactions or he misunderstood them.

In respect of the contention of Mr John Lee, counsel for the plaintiff that the two sales and purchase agreements were not stamped and hence inadmissible by virtue of the Stamp Ordinance which has since been repealed by the Stamp Act 1949 (Revised Act 378/89), in my view there is still the evidence in the memorandum of transfers which spell out the consideration of the sale of the two lots to both defendants. I agree that the events in this case took place a number of years ago and witnesses may be faulty in recalling those events. I am of the view that though the plaintiff may be old at the time of the hearing of this case, however, from my observation of him, he could recall certain evidence quite clearly if it suits him like he was asked to merely thumbprint on the documents and that he did not receive any money; and tends to be a bit faulty if it does not suit him, for example he did not know the second defendant which is contrary to DW6's evidence. In other words, I am of the considered opinion that the plaintiff was taking advantage by enriching himself by selling the two lots to the defendants in addition to selling part of his land (allegedly lot 75) to PW4 and on being pressed and prompted by PW4 he had no choice but to file this action against both defendants and I am not even surprised if the costs of the present proceedings are borne by PW4 for she had all to gain for a meagre sum of $200 that she paid to the plaintiff.

Having heard the witnesses that their demeanour in court and on the evidence adduced I have no doubt in my mind that the plaintiff has failed to prove beyond reasonable doubt that actual fraud was committed by the first defendant in this case. In fact I am more than satisfied that the transaction was in order though the prices may be slightly below the market value but that by itself does not per se mean that there was actual fraud in this case after taking into consideration of the evidence adduced by the plaintiff and the defendants and their witnesses. At most, the plaintiff's allegation of fraud by the first defendant is based on suspicion and conjecture which are insufficient to prove fraud. (See *Chu Choon Moi*'s case.[3]) Clearly it would appear that the plaintiff played out PW4 in this case. In the circumstances I would dismiss the action with costs. As Mr Fabian Lim indicated to the court that his clients will not be pressing for the counterclaim in the event this action is dismissed, I would dismiss the counterclaim of the defendants accordingly.

Claim dismissed.

Solicitors: *Lee & Co*; *Chua & Co.*

Reported by *Wong Kian Kheong*